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16 **UNITED STATES DISTRICT COURT**
17 **EASTERN DISTRICT OF CALIFORNIA**

18 PAUL GORDON,

19 Plaintiff,

20 vs.

21 FORD MOTOR COMPANY;
22 TRACY FORD; and DOES 1 through
23 10, inclusive,

24 Defendants.

25 Case No.

26 **DEFENDANT FORD MOTOR
27 COMPANY'S NOTICE OF
28 REMOVAL OF ACTION PURSUANT
TO 28 U.S.C. §§ 1332, 1441, 1446**

29 Sup. Ct. Comp. filed: May 21, 2021
30 Removed: November 22, 2021

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32 **NOTICE OF REMOVAL**

33 **TO THE CLERK OF THE ABOVE-ENTITLED COURT:**

34 **PLEASE TAKE NOTICE** that Defendant FORD MOTOR COMPANY
35 ("Ford"), by its counsel GORDON REES SCULLY MANSUKHANI LLP, hereby
36 removes to this court, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446, based on
37 diversity of citizenship, the claims pending as Case No. STK-CV-UBC-2021-
38 0004717 of the Superior Court of California, County of San Joaquin. In support of
39 this removal, Ford states as follows:

I. THE REMOVED CASE

1. This removed case is a civil action commenced in the Superior Court of California, County of San Joaquin by Plaintiff PAUL GORDON (“Plaintiff”) against Ford, entitled *Paul Gordon. v. Ford Motor Company, et al.*, Case No. STK-CV-UBC-2021-0004717 (the “State Action”). The two originally named Defendants were Ford and Tracy Ford. (See **Exh. A** to the Declaration of Trina M. Clayton (“Clayton Decl.”), filed concurrently herewith.) Ford is the only remaining named Defendant in the case as Plaintiff dismissed Tracy Ford on October 27, 2021. (See Clayton Decl., **Exh. B**.)

2. Plaintiff filed his State Action on May 21, 2021. Plaintiff asserted against Ford, five causes of action for violation of California’s Song-Beverly Consumer Warranty Act (“Song-Beverly Act”) including for breaches of express and implied warranty, based on his purchase of a 2017 Ford F-150, VIN 1FTFX1EF7HKE56361, (the “Subject Vehicle”). (See **Exh. A** generally, and Clayton Decl., ¶ 4).

3. As it has been less than one year since the commencement of this action, removal is proper under 28 U.S.C. § 1446(c)(1).

II. PROCEDURAL REQUIREMENTS

4. Generally, a defendant has thirty (30) days from the date of service of a copy of the complaint to remove a case. 28 U.S.C. § 1446(b). However, if the case stated by the initial pleading is not removable, a defendant has thirty (30) days from the date of service or receipt of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable to remove a case. (28 U.S.C. § 1446(3).) Ford was served with a copy of the Complaint on July 17, 2021. (Clayton Decl., ¶ 5.) The Complaint does not contain any means of ascertaining the amount in controversy. (Clayton Decl., ¶ 6, **Exh. A generally.**)

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1 5. Ford received notice of this matter after it was served with a copy of the
 2 Complaint on June 17, 2021. As of the date of service on Ford, this matter was not
 3 removable as the Complaint did not contain facts that gave rise to a “federal
 4 question” and, with the inclusion of Defendant Tracy Ford, a California entity (*See*
 5 Clayton Decl., **Exh. A**, ¶5), complete diversity of citizenship did not exist. 28 U.S.C.
 6 § 1332.

7 6. “[O]nly a voluntary act of the plaintiff [can] bring about removal to
 8 federal court.” *Self v. Gen. Motors Corp.*, 588 F.2d 655, 658 (9th Cir. 1978). This
 9 rule is known as the “voluntary-involuntary” rule, and “requires that a suit remain in
 10 state court unless a ‘voluntary’ act of the plaintiff brings about a change that renders
 11 the case removable.” See *Id.* at 657. A dismissal entered at the request of a party is
 12 a voluntary act. *Heller v. American States Insurance Company*, 2016 WL 1170891,
 13 *3 (C.D. Cal. 2016), (citing *D & J, Inc. v. Ferro Corp.*, (1986) 176 Cal. App. 3d
 14 1191, 1194.

15 7. Plaintiff filed a Request for Dismissal as to Tracy Ford on October 27,
 16 2021. (*See Exh. B* to the Clayton Decl.) In light of Plaintiff’s voluntary dismissal of
 17 Tracy Ford, Ford recognized this matter was now removable to Federal Court based
 18 on complete diversity of citizenship.

19 8. Based upon the Retail Installment Sales Contract (“RISC”), counsel for
 20 Ford was able to ascertain the amount in controversy. (*See Exh. C* to the Clayton
 21 Decl.)

22 9. Pursuant to Fed. R. Civ. Pro. 6(a), a period of greater than 30 days since
 23 Tracy Ford’s dismissal on October 27, 2021 has not elapsed.

24 10. Pursuant to 28 U.S.C. § 1446(a), copies of all processes, pleadings, and
 25 orders for the State Action in Ford’s possession are contained in **Exhs. A-B and E –**
 26 **LL**, to the Clayton Declaration, filed herewith.

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1 11. Pursuant to 28 U.S.C. § 1446(a), venue is proper in the Eastern District
2 of California because this district embraces the place where the State Action has
3 been pending.

4 12. Pursuant to 28 U.S.C. § 1446(d), a true and correct copy of this Notice
5 of Removal will be filed with the Superior Court of California, County of San
6 Joaquin, promptly after filing of same in this Court.

7 13. Pursuant to 28 U.S.C. § 1446(d), written notice of filing this Notice of
8 Removal will be given to all adverse parties promptly after filing the same in this
9 Court.

10 14. If any question arises as to the propriety of the removal of this action,
11 Ford requests the opportunity to conduct discovery, brief any disputed issues, and
12 present oral argument in favor of its position that this case is appropriately
13 removable.

14 15. Nothing in this Notice of Removal shall be interpreted as a waiver or
15 relinquishment of Ford's right to assert defenses including, without limitation, the
16 defenses of (i) lack of jurisdiction over person, (ii) improper venue and/or *forum non*
17 *conveniens*, (iii) insufficiency of process, (iv) insufficiency of service of process, (v)
18 improper joinder of claims and/or parties, (vi) failure to state a claim, (vii) failure to
19 join indispensable party(ies), or (viii) any other procedural or substantive defense
20 available under state or federal law.

21 **III. THE AMOUNT IN CONTROVERSY REQUIREMENT IS MET**

22 16. For diversity jurisdiction over a claim, the amount in controversy must
23 exceed \$75,000. *See* 28 U.S.C. § 1332. The amount in controversy in this action
24 exceeds \$75,000, exclusive of interest and costs.

25 17. The removing party's initial burden is to "file a notice of removal that
26 includes 'a plausible allegation that the amount in controversy exceeds the
27 jurisdictional threshold.'" *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1195 (9th
28 Cir. 2015) (quoting *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct.

1 547, 554 (2014). “By design, § 1446(a) tracks the general pleading requirement stated
 2 in Rule 8(a)” which requires only that the grounds for removal be stated in a “short
 3 and plain statement.” *Dart*, 135 S. Ct. at 553.

4 18. Generally, a federal district court will first “consider whether it is
 5 ‘facially apparent’ from the complaint that the jurisdictional amount is in
 6 controversy.” *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 690 (9th Cir. 2006) (internal
 7 citation omitted). But a defendant may remove a suit to federal court notwithstanding
 8 the failure of the plaintiffs to plead the required amount. Absent the facial showing
 9 from the complaint, the court may consider facts averred in the removal petition. *Id.*
 10 Next, if the defendant’s allegation(s) regarding the amount in controversy is
 11 challenged, then “both sides submit proof and the court decides, by a preponderance
 12 of the evidence, whether the amount-in-controversy requirement has been satisfied.”
 13 *Ibarra*, 775 F.3d at 1195. At that time, “it may be appropriate to allow discovery
 14 relevant to [the] jurisdictional amount prior to remanding.” *Abrego*, 443 F.3d at 691
 15 (internal citation omitted).

16 19. Ford disputes that it is liable for any damages whatsoever to Plaintiff.
 17 Nevertheless, Ford can demonstrate that the amount in controversy exceeds \$75,000
 18 under the “preponderance of the evidence” standard. *See Guglielmino v. McKee*
 19 *Foods Corp.*, 506 F.3d 696, 699 (9th Cir. 2007). The standard requires only that the
 20 removing party present evidence that “it is more likely than not” that the amount in
 21 controversy is satisfied. *Id.*

22 20. In this products liability case, Plaintiff seeks monetary relief. Plaintiff
 23 alleges five causes of action under the Song-Beverly Act, including breaches of
 24 express and implied warranties. (*See* Clayton Decl., **Exh. A**, ¶¶ 40-47.)

25 21. Plaintiff further alleges that on or about November 25, 2017, he
 26 purchased a 2017 Ford F-150 (“Subject Vehicle”) and that, during the warranty
 27 period, “the Vehicle contained or developed defects... [which] substantially impair
 28 the use, value, or safety of the Vehicle” (*See* Clayton Decl., **Exh. A**, ¶¶ 9, 12.)

1 22. Plaintiff seeks monetary relief under the Song-Beverly Act, including
 2 actual damages, restitution, all incidental and consequential damages, costs and
 3 attorney's fees, and a **civil penalty of up to two times the amount of actual**
 4 **damages.** (See Clayton Decl., **Exh. A**, ¶¶ 28-29, 35, 38, 42, and Prayer for Relief at
 5 p. 10:20-11:4.)

6 23. The amount in controversy calculation includes civil penalties under the
 7 Song-Beverly Act. *Brady v. Mercedes-Benz USA, Inc.*, 243 F. Supp. 2d 1004, 1009
 8 (N.D. Cal. 2002).

9 24. The amount in controversy also includes reasonable estimates of
 10 attorney's fees. *Id.* at 1011; *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 700
 11 (9th Cir. 2007); *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998).
 12 Moreover, where attorney's fees are recoverable, future fees, and not just fees
 13 incurred at the time of removal, are "at stake" in the litigation and should be included
 14 in the amount in controversy. *Fritsch v. Swift Transp. Co. of Ariz., LLC*, 899 F.3d 785,
 15 794 (9th Cir. 2018).

16 **A. Plaintiff's Damages Under the RISC.**

17 25. Pursuant to the RISC, the total amount paid (purchase price) for the
 18 Subject Vehicle was \$58,448.54. (See Clayton Decl., ¶17.)

19 26. If Plaintiff were to prevail on his Song-Beverly claims, he could be
 20 awarded damages well in excess of \$75,000.00, as Plaintiff contends he is entitled to
 21 double civil penalties. (See Clayton Decl., **Exh. A**, ¶¶ 28-29, 35, 38, 42, and Prayer
 22 for Relief at p. 10:20-11:4.) Plaintiff's actual damages of at least \$58,448.54 (i.e., the
 23 amount paid for the Vehicle pursuant to the RISC), plus \$116,897.08 as a double civil
 24 penalty pursuant to Civil Code Section 1794, total \$175,345.62. (Clayton Decl., ¶¶
 25 17-19 and **Exh. C.**)

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1 27. FORD notes that this amount is conservative, as it does not include
 2 Plaintiff's claim for attorney's fees/costs, or incidental or consequential damages
 3 (such as yearly registration fees). (See Clayton Decl., **Exh. A**, Prayer for Relief at
 4 10:20-11:4.)

5 **B. The Mileage Offset**

6 28. Pursuant to the Song-Beverly Act, a vehicle manufacturer (such as Ford)
 7 is entitled to deduct from the purchase price a "mileage offset" for the time a plaintiff
 8 drove the vehicle trouble-free. Cal. Civ. Code § 1793.2(d)(2)(C). The mileage offset
 9 is calculated pursuant to a statutory formula, whereby the purchase price is multiplied
 10 by the mileage the vehicle was driven "prior to the time the buyer first delivered the
 11 vehicle to the manufacturer or distributor, or its authorized service and repair facility
 12 for correction of the problem that gave rise to the nonconformity," and dividing this
 13 amount by 120,000. Cal. Civ. Code § 1793.2. (Clayton Decl., ¶ 20.)

14 29. Ford disputes that a "mileage offset" must be factored into the amount
 15 in controversy calculation. The amount in controversy is established by what a
 16 plaintiff demands by way of their Complaint, not by any reductions that a defendant
 17 might achieve through its defenses. See *Geographic Expeditions, Inc. v. Estate of*
Lhota ex rel. Lhotka, 599 F.3d 1102, 1108 (9th Cir. 2010) ("[I]f a district court had
 18 to evaluate every possible defense that could reduce recovery below the jurisdictional
 19 amount the district court would essentially have to decide the merits of the case before
 20 it could determine if it had subject matter jurisdiction"); see also *Garcia v. ACE Cash*
Express, Inc., No. SACV 14-0285-DOC, 2014 WL 2468344, at *3 (C.D. Cal. May
 21 30, 2014) (relying on *Geographic Expeditions* to hold that "potential offsets are
 22 inapplicable to the amount-in-controversy exception").

23 30. Assuming arguendo that the mileage offset should be considered, as
 24 demonstrated below, the mileage offset would not cause the amount in controversy
 25 to be reduced to less than \$75,000.

26 31. Here, Repair orders provided by Ford's affiliated dealership and seller

1 of the Subject Vehicle, Tracy Ford, indicate the first presentation Plaintiff made for
 2 any alleged vehicle “nonconformity” was on March 6, 2018. Plaintiff’s complaints
 3 for this presentation were for the tailgate bumper stop coming apart and also for the
 4 110-volt outlet being operable. The vehicle mileage at the time of this presentation
 5 was 11,472. (See Clayton Decl., ¶ 21, and **Exh. D** to Clayton Decl.)

6 32. Pursuant to the RISC, Plaintiff purchased the Subject Vehicle with 15
 7 miles on the odometer. Thus, Plaintiff drove the Vehicle 11,457 miles before the first
 8 presentation for correction of the problem that gave rise to the nonconformity.
 9 (11,472-15 = 11,457 miles.) (See Clayton Decl., ¶ 22, and **Exh. C** to Clayton Decl.)

10 33. Using the Song Beverly offset calculation, 11,457 miles, divided by
 11 120,000 miles, and then multiplied by the purchase price of the Subject Vehicle
 12 (\$58,448.54), obtains the offset figure of \$5,580.37. Subtracting the offset amount
 13 from the total cost of the Subject Vehicle brings the amount of “actual” damages to
 14 \$52,868.17. (\$58,448.54 - \$5,580.37 = \$52,868.17.) With Plaintiff’s request for a
 15 two-time civil penalty, the total amount of damages is **\$158,604.51**¹. (Clayton Decl.,
 16 ¶ 23.) This does not even take into account Plaintiff’ claim for attorney’s fees/costs
 17 or incidental and consequential damages and represents the minimum amount in
 18 controversy for this case.

19 34. Thus, the total amount in controversy exceeds \$75,000, and the amount
 20 in controversy requirement is satisfied. (See Clayton Decl., ¶ 24; Cal. Civ. Code §
 21 1793.2(d)(2)(B)-(C); § 1794(c).).

22 **IV. DIVERSITY OF CITIZENSHIP EXISTS**

23 35. For diversity purposes, a person is a “citizen” of the state in which he
 24 is domiciled. *See Kantor v. Wellesley Galleries, Ltd.*, (9th Cir. 1983) 704 F.2d 1088;

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 28¹ (\$52,868.17 x 2 = \$105,736.34) + \$52,868.17 = \$158,604.51

1 *see also LeBlanc v. Cleveland*, (2d Cir. 2001) 248 F.3d 95, 100. (citizenship
 2 determined at time lawsuit is filed); *Lundquist v. Precision Valley Aviation, Inc.*, (1st
 3 Cir. 1991) 946 F.2d 8, 10.) A person's domicile is the place he or she resides with
 4 the intention to remain, or to which he or she intends to return. *See Kanter v. Warner-*
 5 *Lambert Clew & Moss*, (9th Cir. 1986) 797 F.2d 747, 749-50.

6 36. Plaintiff is and was at the time of filing the Complaint, a citizen and
 7 resident of California. (See Clayton Decl., **Exh. A**, ¶ 2; *Ervin v. Ballard Marine*
 8 *Constr., Inc.* (N.D.Cal. Aug. 11, 2016, No. 16-cv-02931-WHO) 2016 U.S.Dist.
 9 LEXIS 106507, at *8 [internal citations omitted] (plaintiff's complaint stated only
 10 that he was a resident of Oregon, it made no statement about plaintiff's citizenship.)

11 37. The Court found that for diversity purposes plaintiff is a citizen of the
 12 state in which they reside (in the absence of evidence to the contrary).

13 38. Ford is, and was at the time Plaintiff commenced this action, a
 14 corporation organized under the laws of the State of Delaware with its principal place
 15 of business in Michigan. This Court can take judicial notice of these facts. (See
 16 Excerpt from Ford's 2018 Form 10-K filing, **Exhibit MM** to Clayton Decl.; *see also*
 17 Fed. R. Evid. 201(b)(2) (courts may judicially notice facts that "can be accurately and
 18 readily determined from sources whose accuracy cannot reasonably be questioned.")

19 39. Accordingly, complete diversity exists between Plaintiff and Ford.

20 40. Since the dismissal of Tracy Ford on October 27, 2021, no other parties
 21 remain in this action.

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V. CONCLUSION

41. Consequently, the State Action may be removed to this Court by Ford in accordance with the provisions of 28 U.S.C. §§ 1332, 1441, and 1446 because: (i) this action is a civil action pending within the jurisdiction of the United States District Court for the Eastern District of California, (ii) the action is between citizens of different states, and (iii) the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

Respectfully submitted,

By: /s/ *Katherine P. Vilchez*

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